United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

ORIGINAL 75-2145

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA ex rel. AGNES SCRANTON,

Petitioner-Appellant,

-against-

THE STATE OF NEW YORK,

Respondent-Appellee.

- X

On appeal from the United States District Court for the Southern District of New York

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REPLY BRIEF FOR PETITIONER-APPELLANT

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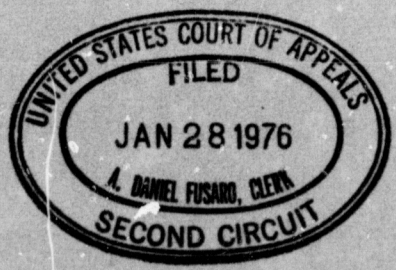

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TABLE OF CASES

STATUTES

UNITED STATES COURT OF APPEALS
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Appellee's brief sidesteps the issue plainly raised by the pleadings and the facts below.

The record before this Court, based upon affidavits of petitioner, her counsel, proceedings at the aborted trial of petitioner for murder in March 1974 (where the trial court over petitioner's objection declared a mistrial) and affidavits from the office of the District Attorney of New York County, establish the prolonged prejudicial and unjustified delay of the prosecution of Agnes Scranton's case. In the alternative, if this Court does not so read the record, there is an adequate basis in that record for a further hearing on the facts (effectively unrebutted) as alleged by petitioner.

Contrary to the assertion of appellee (Appee. Br. p. 3),

appellee did not submit affidavits "rebutting all of Scranton's major contentions". Although nearly two years have gone by since the contention of the prosecution's undue delay was set before the Appellate Division of the Supreme Court of New York County, appellee has not furnished to the court below or to this Court any record of the proceedings which reveal that the petitioner at any time orally or otherwise waived her constitutional right to a speedy trial. Unresponded-to pleadings and papers filed by petitioner establish repeated demands for a speedy trial. Those papers were before the court below and are now before this Court.

In the record of the proceedings below is an unresponded-to affirmation of petitioner's counsel submitted to the State court which, if true (and it is not denied), establishes the bad faith of the State prosecution and gives rise to the "special circumstances" mandating the relief of federal habeas corpus, viz.:

> "This affirmation is submitted to this Court in opposition to the thrust of that certain affirmation of Leslie Snyder dated January 25, 1974, filed in the court below suggesting that the case was not previously brought to trial because of the pressure of the case load in the District Attorney's office and because 'Mrs. Scranton would probably die at any time.'
>
> "It is my opinion and I assert to this Court that the reason that the case was not tried within the four year period following the indictment of Mrs. Scranton for murder on January 6, 1970, was that the deputy in charge of the case for the District Attorney's office did not believe the case had merit.

"I base my opinion on the following grounds.

"Mr. Terence O'Reilly was the Assistant District Attorney in charge of the case from the time I commenced representing Mrs. Scranton until some time in the fall of 1973, when he left the office of District Attorney Frank Hogan. I had many conversations with Mr. O'Reilly concerning the case. I never at any time advised him that Mrs. Scranton was too ill to appear in court or to be tried. We did discuss her illness (congenital sickle-cell disease and necrosis of the right hip associated with the disease) and Mr. O'Reilly did not oppose my application to waive her personal appearance before the court in the myriad of adjournments which took place between April, 1971, when I was first appointed counsel and October, 1973, at about which time Mr. O'Reilly left the office.

"After discussion of the case with Mr. O'Reilly in the summer of 1972, I moved in the Supreme Court to inspect the minutes of the Grand Jury and/or dismiss the indictment pursuant to Criminal Procedure Law § 210.10 and 210.30.

"Mr. O'Reilly advised me and told me that he would advise Judge Joseph P. Martinis, the judge sitting on the motion, that in his (O'Reilly's) personal opinion as a lawyer familiar with the facts of the case, that the court should enter a trial order of dismissal of the indictment because no prima facie case had been made out before the Grand Jury. Judge Martinis denied the motion on January 3, 1973.

"Thereafter, however, Mr. O'Reilly did not ready the case for trial.

"On February 19, 1973,* I put in a telephone call to Mr. O'Reilly at his new firm, Foley, Hickey, Gilbert and Power at 70 Pine Street, New York. I told him that I was seeking a dismissal of the criminal case by an Article 78 Proceeding in this Court and asked whether or not he had, in fact, advised Judge Martinis of his personal opinion of the merits of the case. He told me that he had, in fact, advised Judge Martinis of his personal opinion and the lack of legal merit of the case and that he had advised Judge Martinis that it

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"*This date should read 1974

would be appropriate under the law to dismiss the case. Mr. O'Reilly further stated that he could not then nor now speak for the office of the District Attorney because there were others in the office who disagreed with him. In order to complete the record which unequivocally supports the charge that the District Attorney's office deliberately did not proceed with dispatch or even a modicum of due process during the four year period following Mrs. Scranton's indictment, I attach copies of the following papers from my file and the District Attorney's file. The other conclusion which is inescapable is that the Court below cooperated with and participated in the unconscionable delay.

"1) Notice of Motion to Produce by defendant dated October 27, 1971;

"2) Memorandum in Opposition to that Motion dated March, 1972;

"3) Supplemental Affirmation of Defendant in Reply dated April 12, 1972;

"4) Notice of Motion to Dismiss the Indictment on the Grounds of a Cavalier Disregard of the Defendant's Rights to a Speedy Determination of Pretrial Issue as Well as the Denial of Speedy Trial dated May 3, 1972;

"5) Decision of Justice Murtagh Ruling on Motion of October 7, 1971, dated June 12, 1972;

"6) Notice of Motion to Inspect the Grand Jury Minutes and/or Dismiss the Indictment dated October 10, 1972;

"7) Memorandum in Opposition to that Motion dated December 18, 1972;

"8) Ruling of Judge Martinis on Motion of October 10, 1972 (no date)

"9) Letter to Terence O'Reilly from defense counsel dated April 30, 1973.

"Thus I state that Mrs. Scranton's right to a speedy trial has been denied by the active failure on the part of the District Attorney and his deputies to

move the case to trial during the period Mr. O'Reilly was in charge of it, and further that the delay was participated in by the Court.

"Accordingly this Court should in the interests of justice grant the Article 78 relief prayed for and dismiss the indictment."

There is a perversity to the position of appellee with regard to the appellee's assertion of continuing readiness for trial. Petitioner commenced in early 1972 asserting her right to a speedy trial and continued to do so up to the commencement of a trial in February and March of 1974. When on March 5, 1974, petitioner's counsel was ready to go forward and was pressing so to do, three jurors having been sworn and put in the box, it appeared that an Assistant District Attorney, Mrs. Leslie Snyder (relatively new to the case, Mr. Terence O'Reilly having been in charge for the preceding three years) became ill. At that juncture the prosecution requested a month's delay and petitioner's attorney suggested, in opposition, that the case could proceed and another person in the District Attorney's office could ready the case for trial (A-285). Instead, over petitioner's objection, a mistrial was declared by the trial justice, and the case did not go forward. Nor did the case go forward at any other time although there was no actual injunction against the State proceeding to trial until Judge Owen of the District Court below at the request of petitioner, issued an injunction against the State proceeding on March 17, 1975.

Under the conceded applicable law of New York, petitioner Agnes Scranton may not assert her Sixth Amendment right to a speedy trial in the New York courts at this juncture* unless she submits herself to trial and is convicted or, in the alternative, pleads guilty to a charge which requires her admission to the fact of murdering her own child -- a charge she has vigorously denied for the past six years.

It is no slight inconvenience to live for six years under the shadow of a murder indictment. Said Justice Powell for the Supreme Court in Barker v. Wingo, 407 U.S. 514, 533 (1972):

> ". . . even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility."

Thus the alternatives offered to petitioner by appellee (appee. Br. p. 7) are of small comfort. Moreover, appellee is not accurate in the statement that

> "Scranton, unlike Braden [Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973)] has not asserted her constitutional rights to a speedy trial. Instead, she has sought to avcid a trial. Indeed, all of Scranton's appellate forays, both in the state and federal courts, have been aimed not at enforcement of her right to a speedy trial, but rather to the avoidance of a trial altogether."

This is simply not true. Petitioner sought for two

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*Reference is made to the prior trial court denial of her motion to dismiss and its unreviewability prior to conviction.

years from 1972 through 1974 to secure her right to a speedy trial and in fact went forward to proceed to such a trial which was aborted on motion of the office of the District Attorney over her objection.

Petitioner is aware of the overriding issue raised here -- that federal intervention in the "state criminal law enforcement process" could be issued only "'under extraordinary circumstances where the danger of irreparable loss is both great and immediate'". See Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue Ltd., 420 U.S. 592 (1975); Wallace v. Kern, 520 F.2d 400, 404 (2 Cir. 1975).

It is petitioner's contention that the record below establishes bad faith and irreparable harm to petitioner and that the record itself shifts the "balance"

> ". . . because we are dealing with a fundamental right of the accused this process [the balancing process] must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."

If this Court denies petitioner relief, it is effectively denying the right to a speedy trial six years after indictment where there has been no showing of fault or delaying tactics on her part. The record, on the contrary, establishes the opposite. The doctrine of abstention applied to the facts here makes a mockery of the Sixth Amendment right to a speedy trial. There is no other remedy available to petitioner.

This is that unusual case which makes appropriate the issuance of the Great Writ.

CONCLUSION

The judgment of the court below should be reversed and the indictment dismissed.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Petitioner-
Appellant

January 28, 1976

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

Docket
~~Index~~ No. 75-2145

UNITED STATES COURT OF APPEALS
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~~Plaintiff~~

against

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Respondent-Appellee.
~~Defendant~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th St. New York, N.Y. 10024

That on January 28 *19* 76 *deponent served the annexed*
REPLY BRIEF FOR PETITIONER-APPELLANT

on HON. LOUIS J. LEFKOWITZ, Attorney General, State of New York
attorney(s) for Respondent-Appellee
in this action at Two World Trade Center, New York, N.Y. two
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

January 28, 1976

George Cohen

GEORGE COHEN
Notary Public, State of New
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1977

August De Fonse

The name signed must be printed beneath
AUGUST DE FONSE

1 Copies Received

Date Jan. 28 1976

Firm District Atty - N.Y.Co. Attn: Mr. La Bush

By ADA Gerald Lobell